Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Petitions for Declaratory Ruling Filed by BellSouth and Alabama 911 Districts Regarding the Meaning of the Commission's Definition of Interconnected VoIP in 47 C.F.R. § 9.3 and the Prohibition on State Imposition of 911 Charges on VoIP Customers in 47 U.S.C. § 615a-1(f)(1)	WC Docket No. 19-44

AT&T'S COMMENTS IN OPPOSITION TO THE ALABAMA 911 DISTRICTS' PETITION FOR DECLARATORY RULING

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INTRODUCTION AND SUMMARY

I. The Commission should grant BellSouth's petition for a declaratory ruling and deny the Alabama 911 Districts' petition. In doing so, the Commission should declare that Voice over Internet Protocol ("VoIP") means just what it sounds like: voice communications transmitted *using* Internet Protocol ("IP") technology. If a voice service transmits voice communications over the last-mile facility to a customer premises in any format *other than* IP, including time division multiplexing ("TDM"), it *cannot* be interconnected VoIP service or any other kind of VoIP service. The Commission should confirm that, for a voice service to qualify as VoIP (including interconnected VoIP), it is a necessary, though not sufficient, condition that voice communications are transmitted over the last mile in IP format.

While the Districts' contentions in their petition are unclear and contradictory, they appear to assert that, even if a provider offers a service that transmits voice communications over the last mile in a *non-IP format* (such as TDM), the service will be interconnected VoIP if the facility transmitting that service terminates at equipment on the customer's premises that has IP-processing capabilities. The Districts appear to take that position even if those IP capabilities are used *exclusively* to process the customer's broadband Internet access service. This appears to be the meaning of the Districts' repeated descriptions of services as "converged" or "integrated" — terms that the Districts never clearly define but that appear designed to allow them to argue that a TDM voice service somehow becomes merged with a broadband Internet access service carried on the same facility as the voice service, thereby transmogrifying the TDM voice service into interconnected VoIP service through its physical proximity to the Internet service. That theory has no basis in the Communications Act or any Commission rule or order.

II. The Districts likewise err in the tests they urge the Commission to adopt in determining what qualifies as customer premises equipment ("CPE") for purposes of the

interconnected VoIP definition. First, as BellSouth explained (at 15-19), for voice services that transmit voice communications over the last mile in IP format, the Commission's interconnected VoIP definition does not rely on the network demarcation point rules to determine whether that service meets the criteria for classifying that service as a VoIP service. Second, there is no justification for the presumption the Districts urge the Commission to adopt: that *all* equipment located within a customer premises is CPE, regardless of the location of that equipment relative to the demarcation point in that building. The Districts identify no evidence showing a "sound and rational connection between the proved and inferred facts," which is required for the Commission to adopt an evidentiary presumption that would shift the burden of production. *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 716 (D.C. Cir. 2011). Third, in making arguments about the CPE the Commission referenced in one prong of its interconnected VoIP definition, the Districts focus on the wrong equipment. As the Commission explained in promulgating its rule defining interconnected VoIP, the CPE in question is exclusively end-user equipment.

III. The Districts' arguments regarding § 615a-1(f)(1) are also infected with error. First, the question of the meaning of 47 U.S.C. § 615a-1(f)(1) is properly part of this proceeding. BellSouth included that question in its primary jurisdiction motion, which the federal court granted in full. In any event, the Districts' petition confirms there is a controversy regarding the meaning of § 615a-1(f)(1) that the Commission should resolve through a declaratory ruling.

Second, the Commission has authority to resolve that dispute. The Commission properly interprets the Communications Act provisions it administers, including § 615a-1(f)(1), and federal courts grant *Chevron* deference to those interpretations. Contrary to the Districts' contentions, BellSouth is not asking the Commission to interpret the meaning of Alabama's 911 statute (or any other state's 911 statute), or to hold that any particular state statute, properly

interpreted, is preempted. But the Commission can and should resolve the controversy about the preemptive scope of § 615a-1(f)(1). The Commission's ruling will assist the courts tasked with resolving the many pending cases in which plaintiffs, like the Districts, assert that state law requires VoIP customers to pay many more 911 charges than similarly situated non-VoIP customers.

Finally, the Commission should resolve the controversy by interpreting § 615a-1(f)(1) to preempt states from requiring VoIP customers to pay more in 911 charges than similarly situated non-VoIP customers, whether that disparity is caused by imposing a higher number of charges on VoIP or a higher rate per charge. That is the only interpretation of the provision that furthers the federal policies of promoting broadband deployment and transitioning to an all-IP network. The Districts' interpretation, in contrast, would allow states to raise the phone bills of a customer that switches from legacy telephone service to VoIP, while maintaining the same quantity of service. The Districts attempt to justify their contrary interpretation by arguing (at 39) that states should have the right to impose more 911 charges on VoIP customers because of supposed greater burdens that VoIP customers place on the 911 system. This argument not only lacks a factual basis but also reveals that the Districts' interpretation conflicts with federal policy.

ARGUMENT

I. VOICE SERVICE TRANSMITTED OVER THE LAST MILE IN A FORMAT OTHER THAN IP CAN NEVER QUALIFY AS VoIP SERVICE

For the reasons set out in BellSouth's petition (at 12-15), the Commission should declare that transmission of a voice service over the last mile in IP format is necessary, but not sufficient, for the voice service to qualify as any form of VoIP, including interconnected VoIP as defined in 47 C.F.R. § 9.3. In other words, if a voice service is transmitted over the last mile in a format *other than* IP, such as TDM, it cannot under any circumstances be deemed an IP-enabled service,

let alone a VoIP or interconnected VoIP service. It follows that, when a TDM voice service is transmitted to a customer's premises over the same last-mile facility as a broadband Internet access service, the physical proximity of the TDM voice service to the Internet service does not transform the TDM voice service into a VoIP service of any kind.

The Districts' current position on this question is unclear. Before the Alabama federal court, the Districts argued that ISDN PRI service — a quintessential TDM service — nonetheless satisfied the Commission's definition of interconnected VoIP when that service was transmitted along with broadband Internet access over a single fiber-optic cable to a customer's premises, even though the PRI service was transmitted in TDM format and never converted to IP format.[1] The Districts' primary basis for seeking damages from BellSouth in the Alabama Action was its theory that Alabama's 911 statute purportedly required telephone companies to bill a 911 charge (of $5.08) on every *telephone number* assigned to an interconnected VoIP customer, and that BellSouth was underbilling 911 charges to its ISDN PRI customers because those customers actually were buying interconnected VoIP service.[2] After BellSouth informed the Districts that BellSouth did not offer *any* business voice service in Alabama that transmitted voice communications over the last mile in IP during the relevant period (before October 1, 2013), the Districts first advanced their theory that TDM voice services are actually interconnected VoIP by virtue of their physical proximity to broadband Internet access services, so that they could maintain their damages claims in the litigation.[3]

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[1] *See* Letter from Districts' counsel to BellSouth's counsel at 4 (Apr. 12, 2017) (BellSouth Pet. Ex. 3).

[2] *See* First Am. Compl. ¶¶ 21-26, No. 2:15-cv-00765-SGC (N.D. Ala. Dec. 18, 2015) (Dkt. 19), https://bit.ly/2wTxGGP.

[3] The Districts continue to assert (at 13 n.12) that they disbelieve BellSouth's representation about the nature of the services it offered to Alabama businesses, "[b]ased on various items of information that the Districts have obtained." The Districts do not identify any

The Districts appeared to retreat from their theory when BellSouth and the Districts worked collaboratively to draft the joint background section to both petitions for declaratory ruling. As part of that process, the Districts agreed that in *every* factual scenario depicting a voice service transmitted over the last mile in a non-IP format — Scenarios 1, 2, 3a, and 3b — the voice service was not interconnected VoIP or any other form of VoIP. *See* Districts Pet. 9-10; BellSouth Pet. 8-9.

The Districts' change of position appears to have been short-lived. The Districts now assert in their petition that the "network demarcation points depicted in scenarios 1, 2, [and] 3" are "in conflict with" federal law regarding the location of the demarcation point and the statutory definition of CPE. Districts Pet. 13. But the Districts do not state whether that new assertion alters their position on whether a voice service can be a VoIP service even when it is transmitted over the last mile in a non-IP format.

The Argument section in the Districts' petition does not clarify matters. The introduction to the Argument section asserts that "any service that *terminates a voice transmission in IP format* in equipment on a customer's or building-owner's premises constitutes a service that requires the use of IP customer premises equipment in satisfaction of the Commission's definition [of] IVoIP" — that is, interconnected VoIP. *Id.* at 14-15 (emphasis added). This statement recognizes (correctly) that a voice service must, at a minimum, be transmitted in IP

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of those "items of information," but whenever the Districts in the past claimed to have such information, those claims were based on clearly erroneous readings of documents. For example, the Districts once pointed to BellSouth customer bills referencing "SIP," which the Districts claimed were evidence that the services offered "Session Initiation Protocol" and, therefore, IP-based voice service. But BellSouth showed the Districts that the "SIP" in question was a "static IP" offering in connection with a data service (DSL), not voice service. While factual disputes regarding the nature of BellSouth's services are not before the Commission, the Commission should grant no credence to the Districts' unsupported assertions that BellSouth is making false claims to the Commission regarding the services it provided.

format (rather than TDM) to qualify as interconnected VoIP. But, in the section heading that appears a few lines later, the Districts take a conflicting position, asserting that "[a]ny equipment on the customer's premises that receives, transmits, or processes IP packets constitutes IP CPE, and *voice service that uses such a device constitutes VoIP*." *Id.* at 15 (emphasis added; capitalization altered). On this view, a voice service is VoIP if it *uses* equipment on the customer's premises that processes IP packets, even if the voice service itself is never in IP format and the equipment processes IP packets exclusively in connection with the customer's broadband Internet access service.

Further obscuring the nature of the Districts' position is their assertion that the Alabama Action focuses on "BellSouth's 'integrated' or 'converged' service where voice and data travel over the same IP broadband connection to the user's location." *Id.* at 12. Apart from that sentence, the Districts offer no explanation of what they mean by an "integrated service" or a "converged service," and those terms are not found in the Communications Act or used in the Commission's rules or orders. To the extent the Districts use those terms to refer to a TDM voice service transmitted over the same last-mile facility as a broadband Internet access service, the Districts again appear to be attempting to return to their initial position in the federal court that "Voice over Internet Protocol" really means "Voice *nearby* Internet Protocol."

That theory fails for all the reasons set forth in BellSouth's petition (at 12-15). In addition, the Districts' formulation (at 15) that a voice service is VoIP if it *uses* IP-compatible CPE conflicts with the plain text of the Commission's rule. To qualify as interconnected VoIP, the service must "*[r]equire[]* Internet protocol-compatible customer premises equipment." 47 C.F.R. § 9.3 (emphasis added). A voice service that makes no use of the IP features of IP-compatible CPE — because the customer has that CPE solely for use with its broadband

Internet access service — cannot be said to *require* IP-compatible CPE on any reasonable reading of the word "require."[4] In all events, where a voice service is not transmitted over the last mile in IP format, it is ultimately beside the point whether IP-compatible CPE is somehow *used* in connection with the various services the customer has purchased: such a voice service is not IP-enabled and, therefore, cannot be any kind of VoIP service, including interconnected VoIP. *See* BellSouth Pet. 19-21.

The Districts' shifting positions before the federal court and the Commission — and within their petition — highlight the need for the Commission to issue a clear declaratory ruling reaffirming that a voice service that is neither transmitted over the last mile nor handed off to the end-user customer in IP is not an interconnected VoIP service under § 9.3 or any other kind of VoIP service.

II. THE COMMISSION'S DEMARCATION POINT RULES ARE IRRELEVANT TO DETERMINING WHETHER A VOICE SERVICE TRANSMITTED OVER THE LAST MILE IN IP IS A VoIP SERVICE

While transmission of a voice service over the last mile in IP is a *necessary* condition for a voice service to qualify as VoIP, it is not a *sufficient* one. Companies may convert voice services to IP format for transmission over the last mile for their own internal provisioning reasons,[5] just as many (if not all) companies use IP format in their internal voice networks without thereby causing all of the phone services they offer to qualify as VoIP services. Rather than looking to its demarcation point rules to identify which such services that use IP technology qualify as VoIP services, the Commission should apply a practical test focusing on what the

[4] For the reasons stated in BellSouth's petition (at 19-20 and n.28), a TDM voice service also does not require a broadband connection for purposes of 47 C.F.R. § 9.3.

[5] As BellSouth explained in its petition (at 13 & n.18), AT&T is not one of those companies.

customer ordered. If the customer ordered an IP voice service, then the service is VoIP. If the customer instead ordered a non-IP voice service (such as a TDM service), but the telephone company independently elects to transmit the voice communications in IP over the last mile before converting it to the non-IP service the customer ordered, the service is not VoIP. *See* BellSouth Pet. 16. The Commission should thus follow the same kind of reasoning as in the *IP-in-the-Middle Order*,[6] where the Commission found that internal telephone company provisioning decisions that do not alter the product that the end-user customer receives should not be considered when classifying a service.

The practical test BellSouth proposed faithfully applies the plain language of the Commission's interconnected VoIP definition. A TDM voice service does not *require* IP-compatible CPE — on any reasonable reading of the word "require" — merely because the telephone company chooses to transmit the service to the customer's premises in IP format and the equipment that converts the service to the format the customer ordered happens to qualify as CPE based on its location relative to the demarcation point in that particular building. Classifying services in accordance with what the customer orders and receives is consistent with past Commission orders, fairly applies the interconnected VoIP definition, and eliminates any possibility or incentive for telephone companies to engage in regulatory arbitrage through their internal provisioning decisions. The Districts' contrary arguments lack merit.

1. The Districts first argue (at 17-18) that CPE, for purposes of § 9.3, should be "defined . . . in reference to the network demarcation point," with equipment falling on the customer side of the network demarcation point qualifying as CPE. For reasons BellSouth

[6] Order, *Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, 19 FCC Rcd 7457 (2004) ("*IP-in-the-Middle Order*").

explained (at 17-19), it is inappropriate to use the network demarcation point to determine what counts as IP-compatible CPE when applying the Commission's definition of interconnected VoIP. Neither the regulation itself nor the *VoIP 911 Order*[7] promulgating that regulation makes any reference to the network demarcation point.[8] Instead, the Commission developed its network demarcation point regulations years before its interconnected VoIP definition and for a completely different purpose: to protect the quality of inside wiring and to divide control over wiring between the telephone company and the customer.[9] Further, the location of the demarcation point can vary building by building for reasons that have nothing to with whether a service is or should be classified as VoIP, such as the number of tenants, the age of the building, the standard operating practices of the telephone company, or the choice of the building owner.[10] The same service, provisioned in the same way, to customers in different buildings should not be classified differently due to the happenstance that led the demarcation points in those two buildings to be in different places relative to the location of equipment that converts the voice service into the format that the customer ordered.

Contrary to the Districts' contention (at 19 & n.26), BellSouth is not judicially estopped from taking that position. Nothing BellSouth said in its petition is inconsistent with the arguments AT&T and others made in an amicus brief in *Charter Advanced Services (MN), LLC v. Lange*, 903 F.3d 715 (8th Cir. 2018). In that case, all parties — including the Commission,

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[7] First Report and Order and Notice of Proposed Rulemaking, *IP-Enabled Services*, 20 FCC Rcd 10245 (2005) ("*VoIP 911 Order*").

[8] *See generally* 47 C.F.R. § 9.3; *VoIP 911 Order*; *see also* BellSouth Pet. 17.

[9] *See* BellSouth Pet. 17-18; Notice of Proposed Rulemaking, *2000 Biennial Regulatory Review of Part 68 of the Commission's Rules and Regulations*, 15 FCC Rcd 10525, ¶ 5 (2000).

[10] *See* BellSouth Pet. 18-19; 47 C.F.R. § 68.105(c), (d).

which also filed an amicus brief — agreed that the Charter service at issue is a VoIP service.[11] The dispute involved whether that VoIP service is also an information service or, instead, a telecommunications service. In the portion of the amicus brief the Districts cite, AT&T and others supported Charter's argument that its VoIP service offered the capability of a net protocol conversion and, therefore, is an information service. The question whether VoIP is an information service or a telecommunications service has nothing to do with plaintiffs' claims in the Alabama, Florida, and Pennsylvania Actions that telephone companies are not properly identifying certain of their voice services as VoIP services for purposes of billing 911 charges. Therefore, there is no conflict between the position in the amicus brief AT&T joined and BellSouth's position here, let alone the kind of clear inconsistency necessary to give rise to judicial estoppel.[12]

2. Doubling down on their assertion that the location of the network demarcation point should be used in determining whether a service is interconnected VoIP, the Districts next argue that "all equipment that transmits, processes, or receives IP packets located on or within the customer's premises is *presumptively* on the customer's side of the network and thus qualifies as IP-CPE for purposes of applying the definition of IVoIP in 47 C.F.R. § 9.3." Districts Pet. 20-21 (emphasis added). But the Districts offer no evidentiary support for the proposed presumption about the location of IP-capable equipment on a customer's premises relative to the demarcation point for that building — or for each customer within that building. The Districts also do not and cannot dispute that the Commission's regulations allow for the

[11] Br. of FCC as Amicus Curiae in Supp. Plaintiffs-Appellees at 16, No. 17-2290, 2017 WL 4876900 (8th Cir. Oct. 26, 2017) ("FCC *Charter* Br.").

[12] *See*, *e.g.*, *Comcast Corp. v. FCC*, 600 F.3d 642, 647 (D.C. Cir. 2010) ("For judicial estoppel to apply, . . . a party's later position must be clearly inconsistent with its earlier position.").

demarcation point to vary, building by building, and also to be located far inside a customer premises, particularly in a multi-unit building, where there can be a separate demarcation point for each unit within the building.[13]

Under well-established law, agencies may adopt rebuttable presumptions "only . . . if there is a sound and rational connection between the proved and inferred facts, and when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it."[14] The Districts make no attempt to show that its proposed presumption is rational, rather than simply a way to relieve them of their burden as plaintiffs of producing customer-specific evidence that would be necessary to support their damages theory.

3. Finally, the Districts' argument about CPE focuses on the wrong equipment. The Districts point (at 17) to the general definitions section of the Communications Act, which states that "[t]he term 'customer premises equipment' means equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications." 47 U.S.C. § 153(16). But in the order in which the Commission promulgated its rule defining interconnected VoIP, the Commission offered a more specific definition of the "IP-compatible CPE" to which it was referring in that context:

> The term "IP-compatible CPE" refers to *end-user equipment* that processes, receives, or transmits IP packets. Users may in some cases attach conventional analog telephones to certain IP-compatible CPE in order to use an interconnected VoIP service. For example, IP-compatible CPE includes, but is not limited to, (1) terminal adapters, which contain an IP digital signal processing unit that performs digital-to-audio and audio-to-digital conversion and have a standard telephone jack connection for connecting to a conventional analog telephone;

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[13] *See* 47 C.F.R. § 68.105(c), (d).

[14] *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 716 (D.C. Cir. 2011) (quoting *Nat'l Mining Ass'n v. Dep't of Interior*, 177 F.3d 1, 6 (D.C. Cir. 1999)).

> (2) a native IP telephone; or (3) a personal computer with a microphone and speakers, and software to perform the conversion (softphone).[15]

Not all equipment within a customer's premises that is on the customer's side of the demarcation point — and, therefore, qualifies as CPE for purposes of 47 U.S.C. § 153(16) — is the kind of "end-user equipment" the Commission intended to satisfy its interconnected VoIP definition. To take an obvious example, in a multi-tenant building, equipment in the building basement or telephone closet that is used to provide service to all the tenants in the building is not end-user equipment. That is true even if the building is one where the demarcation point is located such that the shared equipment is not on the provider's side of the network demarcation point. Such shared equipment is not the type of "end-user equipment" — such as a terminal adapter, an IP telephone, or a personal computer — the Commission sought to capture in its interconnected VoIP definition.[16] The Districts make no attempt to demonstrate that the equipment on which they focus in making their arguments about which services qualify as interconnected VoIP is "end-user equipment" within the meaning of the *VoIP 911 Order*.

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[15] *VoIP 911 Order* ¶ 24 n.77 (emphasis added).

[16] The *VoIP 911 Order* required interconnected VoIP providers to distribute to subscribers "warning stickers or other appropriate labels warning subscribers if E911 service may be limited or not available" and to "instruct[ ] the subscriber to place them on and/or near the CPE used in conjunction with the interconnected VoIP service." *VoIP 911 Order* ¶ 48. This requirement confirms that when using the term "CPE" in the interconnected VoIP definition, the Commission had in mind the end-user equipment the customer actually sees when using the voice service, not all equipment located on or within the customer's building.

III. THE COMMISSION SHOULD DECLARE THAT 47 U.S.C. § 615a-1(f)(1) PRECLUDES STATES FROM MAKING VoIP CUSTOMERS PAY MORE IN 911 CHARGES THAN SIMILARLY SITUATED NON-VoIP CUSTOMERS

A. The Parties' Dispute About the Meaning of § 615a-1(f)(1) Is Properly Before the Commission for Resolution

The Commission should reject the Districts' suggestion that it should refuse to consider the meaning of 47 U.S.C. § 615a-1(f)(1), the Communications Act's preemption provision relating to the 911 charges states may require VoIP customers to pay. The district court referred this issue to the Commission and, in any event, the dueling petitions demonstrate the existence of a real controversy for the Commission to resolve.

Contrary to the Districts' assertions (at 21-23), the federal court's primary jurisdiction referral encompassed the dispute over § 615a-1(f)(1). BellSouth's primary jurisdiction motion asked the district court to "refer[ ] . . . to the [Commission]" two broadly framed issues, one of which was "[w]hether 47 U.S.C. § 615a-1(f)(1) preempts Ala. Code § 11-98-5.1(c) insofar as it requires customers of VoIP or similar services to pay a charge that exceeds the 911 charges applicable to the same class of subscribers to traditional voice services."[17] The federal court "**GRANTED**" "BellSouth's motion for primary jurisdiction referral" in its entirety, stating that the matter was "**REFERRED** to the FCC for further guidance."[18] Nowhere did the court state, or even suggest, that it was only granting BellSouth's motion in part. Furthermore, the Districts' assertion (at 22) that the court's opinion "focused . . . entirely" on interconnected VoIP and not preemption is false. The federal court concluded that 47 U.S.C. § 615a-1(f)(1) "precluded charges on VoIP services from exceeding the charges on traditional telephone services," and

[17] Def. BellSouth Telecomms., LLC's Mot. for Primary Jurisdiction Referral and Stay at 1-2, No. 2:15-cv-00765-SGC (N.D. Ala. May 18, 2017) (Dkt. 36).

[18] Order at 14, No. 2:15-cv-00765-SGC (N.D. Ala. Mar. 2, 2018) (Dkt. 52) ("Primary Jurisdiction Order").

cited that provision as support for the conclusion that the Alabama statute's classification of VoIP "implicates federal law" and was an appropriate topic for a primary jurisdiction referral.[19]

In any event, regardless of the interpretation of the primary jurisdiction referral order, the parties' dueling petitions reveal the existence of a controversy regarding the meaning of § 615a-1(f)(1) that the Commission can and should resolve using its authority to "issue a declaratory ruling terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2(a). That controversy exists not only in the parties' petitions but also in the Florida and Pennsylvania Actions[20] that have been filed against dozens of telephone companies and in which those courts have also entered primary jurisdiction stays. In those Actions as well, the Districts' contingency-fee consultant, Roger Schneider, acting through a company he created to bring those lawsuits, has argued that the 911 statutes in those states also require VoIP customers, but not non-VoIP customers, to pay 911 charges based on the quantity of telephone numbers they obtain. The question whether § 615a-1(f)(1) would preempt those statutes — if the courts agreed with that interpretation of the 911 statutes — is thus in dispute in all of the stayed Actions.

The Districts also argue (at 23) that those courts, and not the Commission, should decide whether a state statute is preempted by federal law. But this argument misconstrues the nature of the declaratory ruling BellSouth seeks. BellSouth is asking the Commission to issue a ruling declaring the meaning of a provision of the Communications Act. Such a task is squarely one for the Commission, because Congress delegated to the Commission the task of implementing the Communications Act generally and § 615a-1 in particular.[21] Furthermore, the interpretive

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[19] *Id.* at 10-11.

[20] *See* BellSouth Pet. 1 n.1, 7, 14, 15, 21 (identifying and discussing Florida and Pennsylvania Actions)

[21] *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005) ("Congress has delegated to the Commission the authority to 'execute and enforce' the

dispute regarding the meaning of that federal statute — whether Congress preempted states from disadvantaging VoIP services by requiring VoIP customers to pay more in 911 charges than similarly situated customers of traditional telephone service — implicates federal policy objectives regarding deployment of broadband technologies that the Commission is tasked with furthering. To be clear, BellSouth is not asking the Commission, through its petition, to declare that Alabama's 911 law or any other state 911 statute is preempted.[22] BellSouth instead asks the Commission to interpret § 615a-1(f)(1) so that the courts in which the 911-related litigation is pending can interpret those state's 911 laws in light of federal law, properly construed, and determine whether any state's law must be interpreted to impose a result that Congress preempted.

B. Section 615a-1(f)(1) Preempts States from Requiring VoIP Customers To Pay More in Total 911 Charges Than Comparable Customers Buying Non-VoIP Services

The Commission should declare that the phrase "the amount of any such fee or charge" in § 615a-1(f)(1) refers to the total dollar amount of 911 charges, not just the rate per charge. *See* BellSouth Pet. 23-26. Thus, a state 911 statute is preempted insofar as it requires VoIP customers to pay a higher total dollar amount of 911 charges than it requires similarly situated

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Communications Act . . . . Hence, as we have in the past, we apply the *Chevron* framework to the Commission's interpretation of the Communications Act.") (quoting 47 U.S.C. § 151); *see also* 47 U.S.C. § 615a-1(a) (imposing duty on "each IP-enabled voice service provider to provide 9-1-1 service and enhanced 9-1-1 service to its subscribers in accordance with the requirements of the . . . Commission, as in effect . . . and as such requirements may be modified by the Commission from time to time").

[22] That is not because preempting state law is outside the Commission's authority. As the *Vonage Order* demonstrates, the Commission has the authority to preempt conflicting state law. *See* Memorandum Opinion and Order, *Vonage Holding Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404, ¶ 1 (2004) ("*Vonage Order*"); *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007) (affirming *Vonage Order*). Rather, it is because the initial task of interpreting the state 911 laws at issue is not one for which the Commission receives any *Chevron* deference.

customers of the same class of traditional telephone service to pay. That interpretation is consistent with the ordinary meaning of "amount," which is "the total number or quantity: AGGREGATE."[23]

That interpretation is also the only one consistent with the statute's purpose, which is to advance the federal policy of promoting the broad deployment of IP-based technologies such as VoIP and an all-IP communications network. *See* BellSouth Pet. 25-26. For example, the plaintiffs in 911 litigation in South Carolina, who (like the Alabama Districts) have hired Mr. Schneider as a consultant, have argued that South Carolina's 911 law requires a VoIP customer that has obtained thousands of telephone numbers to pay thousands of 911 charges — one for each telephone number. Those same plaintiffs concede that South Carolina's 911 law also caps at 50 per account the number of 911 charges any non-VoIP customer must pay, even if that non-VoIP customer has also obtained thousands of telephone numbers and has the same ability as the VoIP customer to place simultaneous calls.[24] The South Carolina plaintiffs argue, as do the Alabama Districts, that § 615a-1(f)(1) would not preempt such a state statute because Congress only preempted states from imposing different per-unit 911 charges on VoIP and non-VoIP customers. These plaintiffs, like the Alabama Districts, contend that Congress, in enacting § 615a-1(f)(1), was unconcerned with state laws that subjected VoIP customers to massively higher total 911 charges than similarly situated traditional telephone service customers.[25]

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[23] *Webster's Third New International Dictionary* 72 (2002).

[24] *See*, *e.g.*, Pl.'s Mem. in Resp. Defs.' Joint Mot. for J. on the Pleadings at 4, 9-11, *County of Charleston v. AT&T Corp.*, No. 2:17-cv-02534-RMG (D.S.C. Dec. 7, 2018) (Dkt. 142).

[25] *See id.* at 11-13. AT&T and the other defendants in that litigation contest the plaintiffs' interpretation of South Carolina's 911 statute and contend that the same 50-charge cap per account applies to VoIP and non-VoIP customers.

Imposing total 911 charges that are twenty-fold higher — or more — on a customer that switches from TDM to VoIP service would disadvantage VoIP services and hinder the deployment of broadband in exactly the manner Congress intended to prevent when it enacted § 615a-1(f)(1).

The Districts make no attempt to square their interpretation of § 615a-1(f)(1) with the federal policies of promoting both the deployment of broadband and the transition to an all-IP network. And each of the Districts' arguments in favor of its interpretation fails on its own terms. First, the Districts argue (at 37) that legislative history shows that Congress was concerned solely with the per-charge rate, and not the number of 911 charges or total amount billed. But the passage of the House Report the Districts quote comes not from any member of Congress but from a cost estimate provided by a Congressional Budget Office ("CBO") staffer. *See* H.R. Rep. No. 110-442, at 9-12 (2007). In addition, this CBO cost estimate merely states that it is "possible that some state and local governments might impose such [VoIP 911] fees at a rate higher than those charged on other telephone services," *id.* at 11, not that imposing a higher per-charge rate is the only possible way for a state to violate § 615a-1(f)(1).

Second, the Districts argue (at 37-38) that Alabama's response to a Commission survey regarding 911 charges supports their reading of § 615a-1(f)(1). Yet the Districts purport to draw support not from the survey prompt the Commission drafted, but only from Alabama's response to that prompt. That response at best indicates Alabama's interpretation of the survey prompt and has no bearing on the Commission's interpretation of the Communications Act. In any event, Alabama's survey response supports BellSouth's reading, not the Districts' reading. When asked to provide "[t]he amount of the fees or charges imposed" to support 911 services, Alabama responded: "*For wired lines* — Local ECDs could impose a charge of up to 5% of the maximum tariff rate on wirelines within their district, except in counties with less than a

population of 25,000, which could charge a flat rate of up to $2.00." Districts Pet. Ex. 2, at 1-2. This response describes *both* the rate per charge (up to 5% of the maximum tariff rate) *and* the methodology for determining the number of charges owed (the number of "wirelines" as defined by the tariff). Thus, Alabama's response accords with BellSouth's straightforward reading that the "amount of fees or charges" includes the total amount charged, which is the product of the rate per charge and the number of charges due.

Third, the Districts cite (at 38-39) a footnote in the *VoIP 911 Order* that they claim shows that "the Commission did not consider assessing 911 fees for VoIP on a different basis than local exchange service as inequitable or somehow unfair." But, in that footnote, the Commission noted only that "states *may* need to explore other means [than per-line charges] of collecting an appropriate amount from" VoIP customers, "such as a per-subscriber basis."[26] But nothing about the Commission's recognition — in 2005 — that states "may need to explore" other means of calculating the 911 charges due from VoIP customers suggests that the Commission was giving states free rein to require VoIP customers to pay *more* in total 911 charges than similarly situated customers of non-VoIP services. And that footnote certainly cannot constitute the Commission's interpretation of Congress's intent in enacting § 615a-1(f)(1) three years later.

Finally, the Districts close their petition (at 39) with a policy argument that only serves to illustrate that their interpretation clashes with federal policy. According to the Districts, "a state acts justifiably and consistently with the text and purpose of the Communications Act if it imposes" higher total 911 charges on VoIP customers because VoIP services can place a higher "burden on the 911 system" than traditional telephone service because VoIP services purportedly place "no physical or technological limit" on simultaneous outbound calling capacity. As an

[26] *VoIP 911 Order* ¶ 52 n.163 (emphasis added).

initial matter, the Districts are wrong factually: AT&T and other providers sell VoIP services that, like traditional telephone services, limit the total number of simultaneous calls to or from the PSTN the VoIP customer can place.[27] Nor is BellSouth arguing that a state must impose the same 911 charges on VoIP and non-VoIP customers even when a VoIP customer purchases more service than a non-VoIP customer. But a state cannot require a VoIP customer to pay more in total 911 charges than a similarly situated purchaser of non-VoIP services. For example, a state that, like South Carolina, has decided to cap the total number of 911 charges due from non-VoIP customers at 50 per account per month — no matter the quantity of service those customers purchase — cannot require VoIP customers to pay thousands (or even 51) such charges per account per month. Yet that is exactly what the Districts are arguing here that a state may require, as are the plaintiffs in the other 911 cases. Even if states have policy reasons for preferring such a regime that discriminates against VoIP customers, Congress made a different policy decision. Under the Supremacy Clause, Congress's policy decision prevails.

C. The Districts' Remaining Preemption Arguments Are Irrelevant

The Districts also make a variety of arguments, at some length, about general preemption doctrine that seem intended to rebut arguments that BellSouth never made. BellSouth never argued that "Section 615[a-1] [i]s the source of authority for states to impose 911 services [sic]" or that § 615a-1 "preempts state and local authority to impose E911 fees on services other than

[27] For example, AT&T Corp.'s IP Flexible Reach business VoIP service is a service for which "[c]ustomers choose the calling capacity they require in units of Concurrent Calls, which are similar to simultaneous calls and can be engineered using standard voice traffic tools or by using the Customer's existing voice channel capacity." AT&T Business Service Guide: AT&T Business Voice over IP (BVoIP) Services 54 (Mar. 27, 2019). This service guide is available at the link titled "AT&T Business Voice over IP Services" at the Service Guide Library, AT&T Business Service Guide. *See* https://serviceguidenew.att.com/. AT&T Corp. is a defendant in the Florida and Pennsylvania Actions, but not in the Alabama Action.

those listed in Section 615a-1." Districts Pet. 25. BellSouth recognizes that states had authority to impose 911 charges on customers, including VoIP customers, before Congress enacted § 615a-1 in 2008. Thus, the Districts' arguments (at 25-36) that states are not generally preempted from assessing 911 charges are irrelevant, and the Commission need not and should not address them.

Instead, the argument the Districts seem to be referencing is one that is and always has been limited to VoIP service. For VoIP service, the law is clear that states can regulate only to the extent the Commission specifically permits. As the Eighth Circuit held, "the [Commission] has determined" that "it must have sole regulatory control" over VoIP, and to the extent states have any authority to regulate VoIP, the Commission "has made clear it, and not state commissions, has the responsibility to decide if such regulations will be applied." *Vonage Holdings Corp. v. Neb. Pub. Serv. Comm'n*, 564 F.3d 900, 905 (8th Cir. 2009). The Commission, in its amicus brief in *Charter*, similarly noted the importance of the Commission "apply[ing] [a] nationwide" regulatory framework to VoIP and stated that, to the extent states wish to regulate VoIP, they should "raise[] those concerns with the [Commission] by requesting a declaratory ruling or a new rulemaking." FCC *Charter* Br. 25-26.

The Commission held in 2005 that states could require interconnected VoIP providers to collect 911 charges from their customers, but the Commission has never extended that authority to non-interconnected VoIP providers. *See VoIP 911 Order* ¶ 52. Accordingly, BellSouth argued in the federal court that Alabama's 911 statute must be read in light of the Commission's decision, which means that states are preempted from requiring providers of non-interconnected

VoIP services to bill 911 charges to their customers.[28] The Alabama federal court agreed, finding that the Alabama statutory term "VoIP or similar service" — enacted just before the Commission codified its interconnected VoIP definition — "must be read in light of the FCC's definition of interconnected VoIP."[29]

The Districts' other preemption arguments similarly address issues as to which there is no controversy requiring resolution. For example, the Districts argue at length (at 28-32) that "Congress has not expressly preempted" Alabama's 911 law, but BellSouth has never contended that the law as a whole is preempted or that Congress singled out Alabama. Rather, BellSouth's argument is that Congress expressly preempted any state 911 law insofar as it requires VoIP customers to pay more in total 911 charges than similarly situated customers of non-VoIP services. The Districts argue (at 32-33) that Congress has not "expressed an intent to completely preempt the entire field of E911 funding." Again, BellSouth does not argue that Congress has done so. The Commission has expressly preempted state regulation of VoIP services. Congress codified that decision as to 911 services in § 615a-1 and took the further step of expressly preempting disparate state 911 charges. Finally, the Districts' argument (at 35-36) that Alabama's 911 law does not violate the dormant Commerce Clause does not implicate any live controversy, as there is no claim in the Alabama Action or the other stayed actions that multiple states are imposing 911 charges on the same service sold to a single customer.

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[28] BellSouth's Mem. in Supp. Mot. for Primary Jurisdiction Referral and Stay at 10 & n.12, No. 2:15-cv-00765-SGC (N.D. Ala. May 19, 2017) (Dkt. 39).

[29] Primary Jurisdiction Order 10-11. To the extent the Districts claim (at 26) that states have authority to require customers of "telephone service that is neither IVoIP nor local exchange service" to pay 911 charges, they never specify the service they have in mind. Nor do they explain how — if the service they have in mind is a non-interconnected VoIP service (such as FaceTime) — a state could impose 911 charge obligations on customers of that service, given the Commission's considered decision in the *VoIP 911 Order* not to require providers of non-interconnected VoIP services to provide access to 911.

The Commission should therefore confine its preemption analysis to resolving the real controversy presented: whether the phrase "amount of any such fee or charge" in § 615a-1(f)(1) refers to the total dollar amount of 911 charges, or merely the rate per charge.

CONCLUSION

The Commission should grant BellSouth's petition for declaratory ruling and deny the Districts' petition. The Commission should declare that voice services that do not utilize Internet Protocol to transmit voice communications to or from the end-user customer's premises, including BellSouth's ISDN PRI service in Alabama, are not interconnected VoIP service under 47 C.F.R. § 9.3. The Commission should also declare that the last sentence of 47 U.S.C. § 615a-1(f)(1) prohibits state and local governments from imposing higher 911 charges on interconnected VoIP service than on similar non-VoIP service, whether that is accomplished by imposing a higher number of charges or a higher rate per charge.

Respectfully submitted,

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